

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

74-2623

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MARK BAYER, a minor by his parent and natural guardian,
STEPHEN BAYER, and SUSAN MOONITZ, a minor by her
parent and natural guardian, LILLIAN MOONITZ,

Plaintiffs-Appellees,

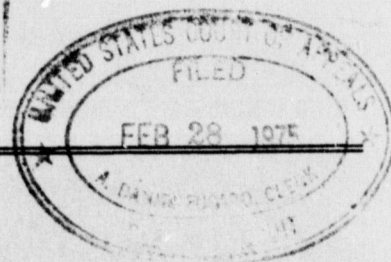
- against -

WILLIAM A. KINZLER, individually and in his capacity as
Superintendent of Schools, Union Free School District No. 22;
JOHN A. McLENNAN, individually and in his capacity as
Principal of Farmingdale High School; BOARD OF EDUCATION,
UNION FREE SCHOOL DISTRICT NO. 22,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF



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PRELIMINARY STATEMENT

The decision herein appealed from was rendered by Judge Mark A. Costantino of the Eastern District Court. His opinion is reported in 383 F. Supp. 1164 (1974). [The case is erroneously designated therein as Beyer v. Kinzler]

THE ISSUES

The issues presented by this appeal are:

1. Whether suppression of publication of school newspaper containing instructional data relative to birth control, pregnancy and abortion is violative of students' First and Fourteenth Amendment rights.
2. Whether publication of the sex information supplement pursuant to lower court order renders the issues on appeal moot.
3. Whether lower court's consolidation and advancement of trial upon the merits with hearing for preliminary injunction denied defendants due process in the absence of notice to the parties.

STATEMENT

Defendants-appellants bring this appeal from judgment in favor of plaintiffs-appellees entered November 13, 1974 after a hearing on application for preliminary injunction before the Hon. Mark A. Costantino.

Distribution of the October 25, 1974 issue of the Farmingdale High School newspaper "Paper Lion" and sex information supplement was terminated by the high school principal and approximately 700 copies of the school sponsored publication were seized. Distribution of approximately 300 copies had been effected before seizure. The four-page supplement contained factual articles pertaining to birth control, pregnancy and abortion. Defendants expressed willingness to release the newspapers without the supplement. This offer was rejected by plaintiffs.

The subject newspaper is subsidized by public taxes. It is not subject to school administration control over its editorial policies. No prior approval is required concerning material content and the board of education has established no regulations governing distribution. No issue of obscenity is involved herein.

An action was initiated on behalf of two minors by their respective parents and guardians against the superintendent of schools, the high school principal and the board of education. One plaintiff is an editor and

the other is a student who signified a desire to desire to receive and read the supplement.

On November 1, 1974 defendants were ordered to show cause why an order should not issue (1) requiring defendants to permit plaintiffs to distribute and receive copies of the October 25, 1974 newspaper and accompanying sex information supplement; (2) requiring defendants to return seized copies of the newspaper and supplement to the editors; (3) declaring that defendants' prohibition against distribution is an unconstitutional infringement of plaintiffs' First Amendment rights. (A-8) On November 7, 1974 oral argument of the motion for preliminary injunction was heard and decision reserved. Memorandum and Order was issued and entered on November 13, 1974. (A-32) Notice of Appeal was filed by defendants-appellants on December 6, 1974. (A-39)

ARGUMENT

POINT I

THE LOWER COURT ERRED IN FINDING THAT PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT RIGHTS WERE INFRINGED BY DEFENDANTS' SEIZURE AND PROHIBITION OF DISTRIBUTION OF NEWSPAPER AND SUPPLEMENT CONTAINING INSTRUCTIONAL DATA RELATIVE TO SEX EDUCATION

Appellants in the lower court argued that exclusive authority and control over scope and content of curriculum

is vested with the board of education by Section 1709(3) and (33) New York Education Law*. It was indicated that the board of education, acting pursuant to regulations of the Commissioner of Education promulgated in accord with Chapter 787, L. 1967, as amended by Chapter 932, L. 1969*, elected not to add sex education to the curriculum of grades 10 to 12, inclusive. It was conceded upon argument of the motion that the student publication is a newspaper in the usual sense and is utilized as a communications media regarding school news, controversial topics and is employed in the teaching of journalism. The publication is regarded by the school administration as an extension of curriculum, approved by the board of education. The argument was advanced that that portion of the sex information supplement which supplied explicit factual information concerning birth control, pregnancy and abortion patently evidences an effort on the part of student editors to go well beyond the realm of editorial comment. The instructional data relating to contraceptive devices is unsigned as is the article concerning symptoms of possible pregnancy. (A-18)

The lower court, while conceding that the instant case is factually distinguishable from Tinker v. Des Moines School District, 393 U.S. 503 (1969) in that it involves

*See Addendum : §1709(3), (33) and §3204 (5) Education Law Ch. 787, L. 1967; Ch. 932, L. 1969 and Ch. 674, L. 1970

publication of factual information rather than expression of an opinion, applied the test set forth in Tinker, namely, that the regulation "is necessary to avoid material and substantial interference with schoolwork or discipline." (A-34) The court reasoned that the attempt of the editorial staff to educate fellow students by means of thoughtfully written articles seems equally deserving of protection under the First and Fourteenth Amendments. (A-35) The court found that seizure and refusal to allow distribution were not reasonably necessary to avoid material and substantial interference with schoolwork or discipline. (A-36) It rejected the premise that seizure was reasonable because publication of the sex education data constituted an unauthorized intrusion into the area of secondary curriculum. The decision held publication of the newspaper and supplement to be an extracurricular activity rather than part of curriculum. In so holding the court attached weight to the fact that no academic credit is given to students serving on the newspaper staff. (A-37)

It is submitted that whether or not academic credit is afforded is immaterial since the school newspaper is in fact an educational device. No stand had been taken by the board of education with respect to the topics involving contraceptives or abortion and there is conspicuously lacking an intent to stifle controversial opinion.

It is apparent that the student editors intended to

utilize the school sponsored newspaper as a journalistic text to introduce sex education data on an instructional basis to the high school student body without prior board of education approval. Had the editors been content to stimulate student interest in the topic areas of birth control, pregnancy or abortion by editorial comment their right to do so would have been undisputed. No issue has been taken by appellants with the general principle that freedom of speech and freedom of the press are liberties protected from invasion by state action by the due process clause of the Fourteenth Amendment. Here, however, the student editors in presenting the factual educational material encroached upon a curriculum area which has been purposely left optional with local school boards as to inclusion. Under these circumstances the case is readily distinguishable from Tinker in that it is concerned with¹ action that intrudes upon the work of the schools.

The authority school officials have over the exercise of constitutional rights by students is limited to² insuring normal functioning of the educational process. Appellants contend that Section 1709 provides the authority to suppress the introduction of sex education data. Normal

1. Tinker, supra, at 508: "Accordingly this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."
2. Sullivan v. Houston Indep. School Dist., 307 F. Supp 1328, 1340 (S.D.Tex. 1969)

functioning of the educational process dictates that the board of education act as its governing body.

In Zucker v. Panitz, 299 F. Supp 102 (S.D.N.Y.1969), at 103 the court observed in a somewhat similar case:

"- - the newspaper is being used as a communications media regarding controversial topics and
- - the teaching of journalism includes the dissemination of such ideas. Such a school paper is truly an educational device."

Unlike the Zucker case opinion is not involved nor is a school-related subject matter. Here the school authorities were faced with an attempt to enlarge the curriculum subject area by the addition of sex education by means of the student news media.

This court in Eisner v. Stamford Board of Education, 440 F. 2d 803, at 807 commented:

"But we cannot deny that Connecticut has authority to minimize or eliminate influences that would dilute or disrupt the effectiveness of the educational process as the state conceives it."

It would seem, therefore, that the board of education has authority to curtail the introduction of sex educational data in order to preserve its exclusive authority and control over curriculum as afforded by the Education Law of the State of New York.

In Russo v. Central School District No. 1, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973) it was stated at 633:

"By our holding today we do not mean to limit the traditionally broad discretion

that has always rested with local school authorities to prescribe curriculum, set classroom standards, and evaluate conduct of teachers and students "in light of the special characteristics of the school environment," citing James v. Board of Education, 461 F.2d 566 (2d Cir. 1972).

In James, at 571, this court described the situation wherein limitation of the exercise of constitutional rights can be justified and stated:

"Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interest of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers."

Appellants contend that student action which usurps authority of the board of education to prescribe the courses of study materially and substantially jeopardizes the effectiveness of the board of education as the duly elected governing body of the school district. As argued in the lower court, "questions involving school board authority ought to be resolved whenever possible on a nonconstitutional basis," Richards v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970). The dissemination of sex education data may well have effectively nullified the constitutional rights of parents whose religious beliefs oppose birth control and abortion. If sex education were included in secondary curriculum such parents would be afforded protection under the provisions of Section 3204 (5) New York Education Law.

POINT II

PUBLICATION OF THE SEX INFORMATION SUPPLEMENT PURSUANT TO LOWER COURT ORDER DOES NOT RENDER THE ISSUES ON APPEAL MOOT

The fact that distribution of the October 25, 1974 issue of the "Paper Lion", including sex information supplement, was effected in compliance with the order of the lower court does not of itself render the issues herein moot. In order to determine whether a justiciable issue is presented a determination must first be made as to whether there is a reasonable probability that the same controversy will recur.³ It is reasonable to assume that the school editors contemplated additional issues relating to the same subject matter. The October 25th issue of the Magazine Supplement (A-18) bears the designation, Vol. I No. I. Decisions rendered in Antonelli v. Hammond, 308 F. Supp. 1329 (D.Mass 1970) and Koppell v. Levine, 347 F. Supp. 456 (E.D.N.Y.) support the premise that a case is not rendered moot merely because the publication was in fact distributed, or because disciplined students have since been readmitted as students, or because a school or college has changed its policies or rules. A court, however will not consider the issues in such cases if the outcome no longer affects the original plaintiffs. That situation does not prevail upon this appeal.

3. United States v. W. T. Grant Co., 345 U.S. 629 (1953)

POINT III

THE LOWER COURT ERRED IN ITS CONSOLIDATION
AND ADVANCEMENT OF TRIAL UPON THE MERITS WITH
HEARING FOR PRELIMINARY INJUNCTION IN THE
ABSENCE OF NOTICE TO THE RESPECTIVE PARTIES

No motion was ~~made~~ made for consolidation and advancement before or after the commencement of the hearing of the application for a preliminary injunction. No stipulation was entered into by respective counsel concerning such procedure. Upon the hearing no notice was given by the court that advancement and consolidation would be ordered. Appellants first learned that advancement and consolidation had taken place upon receipt of the judgment entered on November 13, 1974. Service of the complaint upon defendants was effected on November 7, 1974. Issue had not been joined prior to the entry of judgment.

In advancing and consolidating upon its own motion during the hearing for preliminary injunction the lower court was required by the due process principle to give fair notice of its intention and to afford appellants an opportunity to be heard before disposing of the case upon the merits. In the absence of notice, appellants were deprived of their right to present their case on the merits. Decisions rendered in Pughsley v. 3750 Lake Shore Drive Co-Op Bldg., 463 F.2d 1055 (7th Cir. 1972); Puerto Rican Farm Workers v. Eatmon, 427 F.2d 210 (5th Cir. 1970); Nationwide Amusements Inc. v. Nattin, 452 F2d 651 (5th Cir. 1971); Capital City Gas Co. v. Phillips

Petroleum Co., 373 F.2d 128 (2d Cir. 1967) support the position that notice is an essential element involved in instances where consolidation and advancement is accomplished on the court's own motion, pursuant to Rule 65(a)(2) Fed. R. Civ. P.

CONCLUSION

THE JUDGMENT IN FAVOR OF PLAINTIFFS-APPELLEES
SHOULD BE REVERSED AND THE COMPLAINT DISMISSED

Respectfully submitted,

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ADDENDUM

EDUCATION LAW

§1709. Powers and duties of boards of education

The said board of education of every union free school district shall have power, and it shall be its duty:

* * 3. To prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant. * *

* * 33. To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes. * *

- - - - -

EDUCATION LAW

§3204. Instruction required

* * 5. Subject to rules and regulations of the board of regents, a pupil may, consistent with the requirements of public education and public health, be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporations law.

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Education—Critical Health Problems—Five Year Program

CHAPTER 787

An Act directing the commissioner of education to establish a five year program for critical health problems, and making an appropriation therefor.

Approved and effective May 2, 1967.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The legislature hereby finds and declares that the best interests of the citizens of the state of New York necessitate that the educational requirements regarding cigarette smoking, drugs and narcotics and excessive use of alcohol set forth in this act become the basis for broad, mandatory health curricula in all elementary and secondary schools. Such curricula shall include instruction appropriate for the various grade levels in nutrition, mental and emotional health, family living, disease prevention and control and accident prevention.

§ 2. The commissioner of education is hereby directed to establish a five year program for critical health problems designed to educate the citizens of this state with regard to the deleterious effects resulting from the use of cigarettes, drugs and narcotics and excessive use of alcohol with particular emphasis to be placed on the education of children attending schools in this state. Such program shall include, but shall not be limited to, the following:

(a) organization of a task force to conduct a series of conferences to which will be invited public, private and parochial school authorities, for the development of programs including:

(1) full descriptions of the stimulants, depressants and hallucinogenic drugs by competent authorities.

(2) presentation of experimental misuse of such drugs by representatives of the United States Food and Drug Administration.

(3) presentation of the narcotics problem, cigarette smoking and lung disease, and

(4) summaries by state health and state education department representatives.

(b) establishment of special training centers to provide health training for teachers;

(c) development of a state-wide in-training health program for teachers whereby school districts in the state may establish local health training programs for their teachers leading to certification by the department of education as health education teachers;

(d) development of cooperative health training programs between school districts and institutions of higher education whereby the qualified health personnel of such institutions would be available for local programs;

(e) utilization of the state bureau of radio and television to encourage participation in the program established by this act and to communicate to all the people of the state the objectives of such programs;

(f) establish new health curricula for use in the schools of this state including cigarettes, drugs and narcotics, alcohol, and such other health areas as shall be prescribed by the commissioner of education;

(g) contract with commercial agencies for the development of television tapes, kinescopes and films showing the evils involved in the use of cigarettes, drugs and narcotics;

(h) contract with the communications media of this state to show the above mentioned films during regular television hours;

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Ch. 787 LAWS OF NEW YORK 1967

(i) develop a state program to insure that the appropriate above mentioned films will be shown in all the elementary and secondary schools of this state;

(j) refine the health syllabus with the advice and counsel of the state department of health and other medical authorities.

§ 3. The commissioner of education is hereby designated to act as agent for the state to receive any monies, in addition to the amount hereinafter appropriated, which may become available as a result of participation by the federal government, other states and/or public and private agencies in the health program established by this act.

§ 4. The sum of two hundred fifty thousand dollars (\$250,000), or so much thereof as may be necessary, is hereby appropriated to the education department out of any moneys in the general fund of the state treasury to the credit of the state purposes fund not otherwise appropriated, to defray its expenses, including personal service and maintenance and operation, incurred in the development and initiation of the critical area health program established by this act. Such moneys shall be payable from the state treasury on the audit and warrant of the comptroller on vouchers certified or approved as prescribed by law.

§ 5. This act shall take effect immediately.

Ch. 673 LAWS OF NEW YORK 1970

**Division of Veterans' Affairs—Expenses—AMVETS
Twenty-Sixth National Convention**

CHAPTER 673

An Act making an appropriation to the division of veterans' affairs for expenses incidental to the cooperation of the state in the twenty-sixth national convention of AMVETS (The American Veterans of World War II) to be held during nineteen hundred seventy.

Approved and effective May 8, 1970.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The sum of five thousand dollars (\$5,000), or so much thereof as may be necessary, is hereby appropriated to the division of veterans' affairs out of any moneys in the state treasury in the general fund to the credit of the state purposes fund not otherwise appropriated, for clerical and other services; and services and expenses incidental to the cooperation of the state in holding of and preparation for the twenty-sixth annual convention of the AMVETS (The American Veterans of World War II) to be held in the city of New York during the week beginning August twenty-third, nineteen hundred seventy.

§ 2. This act shall take effect immediately.

Program for Critical Health Problems—Appropriation

CHAPTER 674

An Act to amend chapter seven hundred eighty-seven of the laws of nineteen hundred sixty-seven, entitled "An act directing the commissioner of education to establish a five year program for critical health problems, and making an appropriation therefor", in relation to the continuing of such program.

Approved and effective May 8, 1970.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two of chapter seven hundred eighty-seven of the laws of nineteen hundred sixty-seven entitled, "An act directing the commissioner of education to establish a five year program for critical health problems, and making an appropriation therefor", as amended by chapter nine hundred thirty-two of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

§ 2. The commissioner of education is hereby directed to establish a five year continuing program for critical health problems designed to educate the citizens of this state with regard to the deleterious effects resulting from the use of cigarettes, drugs and narcotics and excessive use of alcohol with particular emphasis to be placed on the education of children attending schools in this state. Such program shall include, but shall not be limited to, the following:

(a) organization of a task force to conduct a series of conferences to which will be invited public, private and parochial school authorities, for the development of programs including:

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Changes or additions in text are indicated by underline

Ch. 932 LAWS OF NEW YORK 1969

for critical health problems, and making an appropriation therefor", are hereby amended to read as follows:

Section 1. The legislature hereby finds and declares that the best interests of the citizens of the state of New York necessitate that the educational requirements regarding cigarette smoking, drugs and narcotics and excessive use of alcohol set forth in this act become the basis for broad, mandatory health curricula in all elementary and secondary schools. Such curricula shall include instruction appropriate for the various grade levels in nutrition, mental and emotional health, family living, disease prevention and control and accident prevention.

§ 2. The commissioner of education is hereby directed to establish a five year program for critical health problems designed to educate the citizens of this state with regard to the deleterious effects resulting from the use of cigarettes, drugs and narcotics and excessive use of alcohol with particular emphasis to be placed on the education of children attending schools in this state. Such program shall include, but shall not be limited to, the following:

(a) organization of a task force to conduct a series of conferences to which will be invited public, private and parochial school authorities, for the development of programs including:

(1) full descriptions of the stimulants, depressants and hallucinogenic drugs by competent authorities.

(2) presentation of experimental misuse of such drugs by representatives of the United States Food and Drug Administration.

(3) presentation of the narcotics problem, cigarette smoking and lung disease, and

(4) summaries by state health and state education department representatives.

(b) establishment of special training centers to provide health training for teachers;

(c) development of a state-wide in-training health program for teachers whereby school districts in the state may establish local health training programs for their teachers leading to certification by the department of education as health education teachers;

(d) development of cooperative health training programs between school districts and institutions of higher education whereby the qualified health personnel of such institutions would be available for local programs;

(e) utilization of the state bureau of radio and television to encourage participation in the program established by this act and to communicate to all the people of the state the objectives of such programs;

(f) establish new health curricula for use in the schools of this state including relating to cigarettes, drugs and narcotics, and alcohol, and such other health areas as shall be prescribed by the commissioner of education;

(g) contract with commercial agencies for the development of television tapes, kinescopes and films showing the evils involved in the use of cigarettes, drugs and narcotics;

(h) contract with the communications media of this state to show the above mentioned films during regular television hours;

(i) develop a state program to insure that the appropriate above mentioned films will be shown in all the elementary and secondary schools of this state;

(j) refine the health syllabus with the advice and counsel of the state department of health and other medical authorities.

§ 2. This act shall take effect immediately.

- (1) full descriptions of the stimulants, depressants and hallucinogenic drugs by competent authorities.
- (2) presentation of experimental misuse of such drugs by representatives of the United States Food and Drug Administration.
- (3) presentation of the narcotics problem, cigarette smoking and lung disease, and
- (4) summaries by state health and state education department representatives.
- (b) establishment of special training centers to provide health training for teachers;
- (c) development of a state-wide in-training health program for teachers whereby school districts in the state may establish local health training programs for their teachers leading to certification by the department of education as health education teachers;
- (d) development of cooperative health training programs between school districts and institutions of higher education whereby the qualified health personnel of such institutions would be available for local programs;
- (e) utilization of the state bureau of radio and television to encourage participation in the program established by this act and to communicate to all the people of the state the objectives of such programs;
- (f) establish new health curricula for use in the schools of this state relating to cigarettes, drugs and narcotics and alcohol;
- (g) contract with commercial agencies for the development of television tapes, kinescopes and films showing the evils involved in the use of cigarettes, drugs and narcotics;
- (h) contract with the communications media of this state to show the above mentioned films during regular television hours;
- (i) develop a state program to insure that the appropriate above mentioned films will be shown in all the elementary and secondary schools of this state;
- (j) refine the health syllabus with the advice and counsel of the state department of health and other medical authorities.

§ 2. This act shall take effect immediately.

Budget Director—Transfer of Appropriations

CHAPTER 675

An Act to amend chapter three hundred fifty-two of the laws of nineteen hundred sixty-three, entitled "An act to authorize the director of the budget to transfer appropriations to implement the establishment of certain centralized services," in relation to the provision of automotive services.

Approved and effective May 8, 1970.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter three hundred fifty-two of the laws of nineteen hundred sixty-three, entitled "An act to authorize the director of the budget to transfer appropriations to implement the establishment of certain centralized services," as last amended by chapter one hundred seventy-two of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

§ 1. Notwithstanding any other provisions of law, the director of the budget is hereby authorized to transfer to the office of general
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Robert La Grasso, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 62-20 60th Rd.
Maspeth, N.Y.

That on the 28 day of Feb, 1975,
deponent personally served the within Appellant's Brief

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving true copies of same with a duly
authorized person at their designated office.~~

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

Marvin Zevin & Alan J. Ayyara
Attorneys for Appellees
33 Willis Ave
Mineola, N.Y. 11501

Robert La Grasso

Sworn to before me this

28 day of Feb, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

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